167-203

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 203.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT, PLAINTIFF IN ERROR,

vs.

JAMES N. HUSTON.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED DECEMBER 18, 1894.

(15,752.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., FEBRUARY 19, 1897.

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1 In the Court of Appeals of the District of Columbia, September Term, 1893.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT, Appellant, *vs.* JAMES N. HUSTON. } No. 251.

Supreme Court of the District of Columbia.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT *vs.* JAMES N. HUSTON.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Declaration.

Filed Oct. 17, 1890.

In the Supreme Court of the District of Columbia, the Seventeenth Day of October, 1890.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT *vs.* JAMES N. HUSTON. } At Law. No. 31013.

The plaintiff sues the defendant for that the plaintiff is a national banking association organized under the laws of the United States and has been for a long time entitled to the possession of one hundred and twelve and $\frac{50}{100}$ dollars of lawful money of the United States deposited by plaintiff in the Treasury of the United States prior to the time hereinafter mentioned as a special deposit for the purpose of being used to redeem the notes of the plaintiff as required by section three of the act entitled "An act fixing the amount of United States notes, providing for the redistribution of national-bank currency, and for other purposes," approved the twentieth day of June, 1874, but for which said purpose the money was not used, and which said purpose terminated on

2 the ninth day of January, 1890, on which date the plaintiff, having theretofore gone into voluntary liquidation, deposited lawful money of the United States sufficient to redeem all its outstanding circulation in accordance with section 5222, Revised

Statutes of the United States, and the defendant was at such time and has ever since been the Treasurer of the United States, and prior to the date mentioned had entered upon the duties and responsibilities of the said office and had undertaken the performance thereof. Wherefore it was the duty of the defendant as such treasurer and he had the power to deliver or cause to be delivered to the plaintiff the one hundred and twelve and $\frac{50}{100}$ dollars of money aforesaid; yet the defendant not regarding his duty in this respect, and though often requested so to do by the plaintiff, has neglected and refused to deliver or cause to be delivered to the plaintiff the said money or any part thereof, nor has the same or any part thereof been delivered to the plaintiff, and the plaintiff claims one hundred and fifteen dollars, besides costs.

And for a second and separate cause of action the plaintiff sues the defendant for that the plaintiff is a national banking association organized under the laws of the United States, and was the owner and entitled to the immediate possession of certain money, consisting of gold and silver coin and United States Treasury notes of the amount and value of one hundred and twelve and $\frac{50}{100}$ dollars, and that on or about the twenty-third day of January, 1890, the defendant converted and disposed of the said money to his own use, and wrongfully deprived the plaintiff of the use and possession thereof, and the plaintiff claims one hundred and fifteen dollars.

JOHN J. CRAWFORD,
Att'y for Plaintiff.

Notice to Plead.

The defendant is to plead hereto on or before the first day of the first special term of the court occurring twenty days after service hereof; otherwise judgment.

JOHN J. CRAWFORD,
Att'y for Plaintiff.

Summons.

Issued Oct. 17, 1890.

In the Supreme Court of the District of Columbia, the 17 Day of October, 1890.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT, Plaintiff,
vs.
JAMES N. HUSTON, Defendant.
} At Law. No. 31013.

The President of the United States to the defendant, Greeting:

3 You are hereby commanded to appear in this court on the first day of its first special term, occurring 20 days after service of this writ on you, to answer the plaintiff's suit and

show why he should not have judgment against you for the cause of action stated in his declaration.

Witness E. F. Bingham, chief justice.

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

[SEAL.]

J. J. CRAWFORD, *Attorney.*

NOTE.—The special terms of the court commence on the first Tuesday of every month except August, in which month there is no term of the court.

Marshal's Return.

Served copies of the declaration, notice to plead, affidavit, and this summons on the defendant the 18th day of October, 1890.

D. M. RANSDELL, *Marshal.*

Motion for Security for Costs.

Filed Dec. 3, 1890.

In the Supreme Court of the District of Columbia.

THE LUMBERMAN'S NATIONAL BANK, Plaintiff, } At Law.
vs. } No. 31013.
JAMES N. HUSTON, Defendant.

And now comes the defendant, by John Blair Hoge, his attorney, and moves the court that the plaintiff, being a non-resident of this District, be required to give security for costs herein.

JNO. BLAIR HOGE,
Attorney for Defendant.

Please take notice that on Saturday, the 13th day of December, 1890, at the opening of the court or as soon thereafter as counsel can be heard, I shall call up the above motion.

JNO. BLAIR HOGE,
Attorney for Defendant.

To John J. Crawford, Esq., attorney for plaintiff.

Undertaking for Security for Costs.

Filed Dec. 20, 1890.

In the Supreme Court of the District of Columbia, the Twelfth Day of December, 1890.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT, Plaintiff, } No. —. At Law.
vs.
JAMES N. HUSTON, Defendant.

The plaintiff and Frederick W. Pratt, its surety, appear
4 and, submitting to the jurisdiction of the court, hereby under-

take for themselves and each of them, their and each of their heirs, executors, and administrators, to make good all costs and charges that the defendant may be put to in case the plaintiff is nonsuited or judgment be given against it; and they further agree that such judgment against the plaintiff may be rendered against all the parties whose names are hereto affixed.

FREDERICK W. PRATT.

Approved Dec. 20th, 1890.

M. V. MONTGOMERY, *Justice.*

This surety is satisfactory to me.

JNO. BLAIR HOGE,
Att'y for Def't.

Demurrer to Declaration.

Filed Dec. 22, 1890.

In the Supreme Court of the District of Columbia.

LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT
vs.
JAMES N. HUSTON.
} At Law. No. 31013.

Demurrer to declaration.

The defendant says that the plaintiff's declaration herein is bad in substance.

JNO. BLAIR HOGE,
Attorney for Defendant.

NOTE.—Among the matters of law relied upon and to be argued in support of the above demurrer are:

First. That the declaration is bad by reason of a misjoinder of counts, the first count apparently sounding in contract and the second in tort.

Second. As to the first count of the declaration, if any cause of action is therein stated, it is a cause of action against the United States and not against this defendant.

Order Sustaining Demurrer.

Supreme Court of the District of Columbia, January Term, 1891.

Proceedings before the supreme court of the District of Columbia, holding a circuit court and special term in and for said District, commencing the first Tuesday, it being the sixth day, of January, A. D. 1891.

* * * * * * *

5 WEDNESDAY, *February* 11, *A. D.* 1891.

Session resumed pursuant to adjournment, Cox, justice, presiding.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT, Plaintiff,
vs.
JAMES N. HUSTON, Defendant.
At Law. No. 31013.

Upon hearing the defendant's demurrer to the plaintiff's declaration in the above-entitled cause, it is considered that said demurrer be, and the same is hereby, sustained, with leave to the plaintiff to amend as to the second count in said cause as he may be advised.

Amended Declaration.

Filed Feb. 20, 1891.

In the Supreme Court of the District of Columbia, the Nineteenth Day of February, 1891.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT
v.
JAMES N. HUSTON.
At Law. No. 31013. Amended Declaration.

The plaintiff sues the defendant—

For that the plaintiff is a national banking association organized under the laws of the United States and located in the city of Williamsport, State of Pennsylvania, and plaintiff heretofore, to wit, on the twenty-third day of January, 1890, was lawfully possessed, as if its own property, of certain money, to wit, gold and silver coins of the United States and United States Treasury notes of great value, to wit, of the value of one hundred and twelve and $\frac{50}{100}$ dollars; and, being so possessed thereof, the plaintiff afterwards, to wit, on the day and year aforesaid, casually lost the said money out of its possession and the same then came to the possession of the defendant by finding; yet the defendant, well knowing the said money to be the property of the plaintiff, but contriving and intending to injure the plaintiff in this behalf, hath not as yet delivered the said money or any part thereof to the plaintiff, although often requested so to do, and afterwards, to wit, on the day and year aforesaid, converted and disposed of the said money to his, the defendant's, own use, to the plaintiff's damage of one hundred and fifteen dollars, for which sum plaintiff claims judgment, besides costs.

JOHN J. CRAWFORD,
Att'y for Plaintiff.

6 *Defendant's Plea.*

Filed M'ch 5, 1891.

In the Supreme Court of the District of Columbia.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT
v.
JAMES N. HUSTON. } At Law. No. 31013.

The defendant, for plea to the plaintiff's amended declaration, says that he is not guilty.

C. C. COLE,
Attorney of the United States in and for the District of Columbia, Attorney for Defendant.

Stipulation of Counsel.

Filed Jan. 29, 1892.

In the Supreme Court of the District of Columbia.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT, Plaintiff,
vs.
JAMES N. HUSTON, Defendant. } At Law. No. 31013.

The parties hereto, by their respective attorneys, hereby stipulate that this action shall be tried by the court without a jury, and that the same may be brought on to be heard by either party upon five days' previous notice.

JOHN J. CRAWFORD,
Att'y for Plaintiff.
CHAS. C. COLE,
Att'y for Defendant.

Revocation of Stipulation.

Filed Feb. 10, 1892.

In the Supreme Court of the District of Columbia.

LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT, Plaintiff,
vs.
JAMES N. HUSTON, Defendant. } At Law. No. —.

The parties hereto, by their respective attorneys, hereby cancel and revoke the stipulation herein waiving a jury trial.
Dated February 4, 1892.

JOHN J. CRAWFORD,
Att'y for Plaintiff.
CHAS. C. COLE,
Att'y for Defendant.

7 *Replication.*

Filed April 28, 1893.

In the Supreme Court of the District of Columbia, the 26th Day of April, 1893.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT, Plaintiff,
vs.
JAMES N. HUSTON, Defendant. } Law. No. 31013, Doc. 35.

The plaintiff joins issue on defendant's plea.

JOHN J. CRAWFORD,
Att'y for Plaintiff.

Judgment.

Supreme Court of the District of Columbia, April Term, 1893.

Proceedings before the supreme court of the District of Columbia, holding a circuit court (division number one) and special term in and for said District, commencing the first Tuesday, it being the 4th day, of April, A. D. 1893.

* * * * * * *

SATURDAY, *May 20th, A. D.* 1893.

Session resumed pursuant to adjournment, Bradley, justice, presiding.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT, Plaintiff,
vs.
JAMES N. HUSTON, Defendant. } At Law. No. 31013.

Now comes here as well the plaintiff, by its attorney, Mr. J. J. Crawford, as the defendant, by his attorney, Mr. A. A. Birney, and a jury of good and lawful men of this District, to wit, Howard Bond, Charles A. Payne, Simon Burnett, Oscar N. Brown, Uriah D. Hilton, Algernon McChesney, Warner H. Wright, James Fullalove, Benjamin P. David, Columbus Eslin, Conrad Roeben, and William Huddleston, who, being duly sworn to try the issue above joined, after the case is given them in charge on their oath say they find said issue in favor of the defendant. Therefore it is considered that the plaintiff take nothing by its suit and that the defendant go thereof without day and recover against said plaintiff the costs of suit, to be taxed by the clerk, and have execution thereof.

8 *Motion for a New Trial.*

Filed May 25, 1893.

In the Supreme Court of the District of Columbia, this 25th Day of May, 1893.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT, PA., Plaintiff, *vs.* JAMES N. HUSTON, Defendant.	At Law. No. 31013, Doc. 35.

Now comes the plaintiff, by its attorney, John H. Crawford, and moves the court to set aside the verdict and judgment in the above-entitled action and grant a new trial upon the grounds following:

1. That the verdict is contrary to the evidence produced at the trial.

2. On bills of exceptions taken during the trial to the rulings of the justice presiding in instructing and refusing to instruct the jury.

3. That the court erred in instructing the jury to find for the defendant upon the case shown.

JOHN J. CRAWFORD,
Att'y for Plaintiff,
Per THOMAS L. WATERS.

To A. A. Birney, Esq., United States district attorney, Washington, D. C.

SIR: Please take notice that on Saturday, May 27th, 1893, at 10 o'clock a. m., or as soon thereafter as a hearing can be obtained, I will move the court to grant a new trial in the above-entitled action on the grounds specified in the motion above written.

JOHN J. CRAWFORD,
Att'y for Plaintiff,
Per THOMAS L. WATERS.

Order Overruling Motion for New Trial.

SATURDAY, *May* 27, *A. D.* 1893.

Session resumed pursuant to adjournment, Bradley, justice, presiding.

Upon hearing the plaintiff's motion for a new trial, it is considered that said motion be, and the same is hereby, overruled.

9 *Notice of Appeal.*

Filed June 9, 1893.

In the Supreme Court of the District of Columbia, this 9th Day of June, 1893.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT, PENN.,
vs.
JAMES N. HUSTON.
} At Law. No. 31013, Docket No. 35.

Comes now the plaintiff, by its attorney, and appeals as well from the judgment of the supreme court of the District of Columbia, entered in the above-entitled action on the 20th day of May, 1893, as from the further order and judgment of said court, rendered on the 27th day of May, 1893, overruling said plaintiff's motion for a new trial on bills of exceptions herein filed.

JOHN J. CRAWFORD,
Attorney for Pl'tf,
Per THOMAS L. WATERS.

Order for Citation.

Filed June 10, 1893.

In the Supreme Court of the District of Columbia, the 10th Day of June, 1893.

THE LUMBERMAN'S NATIONAL BANK
vs.
JAMES N. HUSTON.
} Precipe. At Law. No. 31013.

The clerk of said court will please issue a citation to the Court of Appeals of the District of Columbia upon appeal of the plaintiff'-notes on the 9th day of June, 1893.

JOHN J. CRAWFORD,
Attorney for Plaintiff,
Per T. L. WATERS.

In the Supreme Court of the District of Columbia.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT
vs.
JAMES N. HUSTON.
} At Law. No. 31013.

The President of the United States to James N. Huston, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia on the 4th day of September, A. D. 1893, pursuant to an appeal filed in the clerk's office,

supreme court of the District of Columbia, on the 9th day of
10 June, 1893, wherein The Lumberman's National Bank of Williamsport is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 10th day of June, in the year of our Lord one thousand eight hundred and ninety-three.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 12 day of June, 1893.

A. A. BIRNEY,
Attorney for Appellee.

(Endorsed:) No. 31013. Law. Lumberman's National Bank of Williamsport *vs.* James N. Huston. Citation. Issued June 10th, 1893. Served cop- of the within citation on —— ——. —— ——, marshal. John J. Crawford, attorney for appellant.

Appeal Bond.

Filed June 13, 1893.

In the Supreme Court of the District of Columbia, the 12 Day of June, 1893.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT *vs.* JAMES N. HUSTON. } No. 31013.

Know all men by these presents that we, The Lumberman's National Bank of Williamsport and Frederick W. Pratt, are bound unto the above-named James N. Huston in the sum of five hundred dollars, to be paid to the said James N. Huston, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 12th day of June, 1893.

Whereas the above-named Lumberman's National Bank of Williamsport has prosecuted an appeal to the Court of Appeals of the District of Columbia from the judgment and the order denying a new trial, rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is such that if the above-named Lumberman's National Bank of Williamsport shall

prosecute its said appeal to effect and answer all damages
11 and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT,
By A. S. PRATT & SONS, *Att'y*. [SEAL.]
FREDERICK W. PRATT. [SEAL.]

Approved the 13th day of June, 1893.

E. F. BINGHAM,
Chief Justice S. C. D. C.

Bill of Exceptions.

Filed June 30, 1893.

In the Supreme Court of the District of Columbia.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT *against* JAMES N. HUSTON. } At Law. No. 31013.

SIR: Please take notice that the annexed is a copy of the proposed bill of exceptions of the plaintiff herein, and that the same will be presented for settlement to Hon. Andrew C. Bradley, the justice who tried the cause, at ——, on the — day of ——, 1893.

Dated June 24th, 1893.

JOHN J. CRAWFORD,
Attorney for Plaintiff.

To Hon. A. A. Birney, District attorney, attorney for defendant.

In the Supreme Court of the District of Columbia.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT *against* JAMES N. HUSTON. } At Law. No. 31013.

The issues in this cause came on to be heard before Hon. Andrew C. Bradley, one of the justices of this court, at a circuit on the 20th day of May, 1893. The plaintiff appeared by John J. Crawford, Esq., its counsel, and the defendant by A. A. Birney, his counsel. Thereupon a jury was regularly empannelled and sworn. The plaintiff, by its counsel, opened the case to the jury.

The plaintiff then, to maintain the issues upon its part, put in evidence a copy of the organization certificate of the plaintiff as a national banking association, which copy was certified to be a correct copy of the original on file in the office of the Comptroller of the Currency by James H. Eckels, Comptroller of the Currency, and authenticated by his seal of office.

12 The plaintiff then put in evidence a copy of a certificate dated December 31, 1889, made by S. Jones, cashier of the plaintiff, under the seal of the plaintiff, certifying to the Comptroller of the Currency that at a meeting of the stockholders of the plaintiff, duly notified and held pursuant to law and the articles of association of the plaintiff, at the office of the plaintiff at Williamsport, in the State of Pennsylvania, on the 31st day of December, 1889, it was voted by the stockholders of the plaintiff owning more than two-thirds of the stock that the plaintiff go into liquidation and be closed, which copy was certified by James H. Eckels, Comptroller of the Currency, under his hand and official seal, to be a true and complete copy of the original certificate of liquidation of the plaintiff on file in his office.

The plaintiff then called as a witness THOMAS E. ROGERS, who testified as follows: Witness was the superintendent of the national bank redemption agency in the office of the Treasurer of the United States. Prior to January 23, 1890, the plaintiff had deposited in the Treasury of the United States lawful money of the United States to redeem all its outstanding circulating notes. The plaintiff had also on the said date on deposit in the Treasury of the United States lawful money which had been deposited in pursuance of section 3 of the act of Congress of June 20, 1874, which was known as plaintiff's "five per cent. fund."

Of this "five per cent. fund" one hundred and twelve dollars and fifty cents *was* applied in the payment of the semi-annual tax. This was done by the defendant, who was then the Treasurer of the United States.

The witness produced from the office of the Treasurer of the United States a check, which was offered and admitted in evidence and marked Exhibit A, and was in the words and figures — follows:

EXHIBIT A.

C. T.
No. 32767. WASHINGTON, D. C., *January 23rd*, 1890.

Treasurer of the United States, Washington, D. C., pay to Lumberman's Nat. bk., Williamsport, Pa., by deposit in Treasury U. S. in payment of semi-annual duty, one hundred twelve $\frac{50}{100}$ dollars, $112.50.

J. N. HUSTON,
Treasurer U. S., R. A.

(Written on margin:) State object for which drawn. Balance in 5 % acc't.

Indorsed: S. A., duty, C. D. # 5426. Stamped on face: Paid Jan. 30, 1890, by Treasurer U. S. C. tel.

The witness testified that the stamp on the check, "paid January 30, 1890, by Treasurer U. S.," indicated the deposit of the money into the Treasury. The indorsement on the check indicated that

13 the receiving teller of the cashier's office of the Treasury of the United States issued a semi-annual duty certificate, and this was a deposit in favor of plaintiff for one hundred and twelve dollars and fifty cents. It showed that the money was paid into the Treasury of the United States.

Upon cross-examination the witness testified as follows:

By Mr. BIRNEY:

Q. You have already testified, I believe, that this money was paid into the Treasury of the United States?

A. Yes; this five per cent. was in the Treasury and it was subject to his check in his official capacity as redemption agent at the time of the liquidation.

(By Mr. CRAWFORD:)

Q. It was deposited in pursuance of section 3 of the act of 1874, which required that there should be deposited with the Treasurer of the United States a sum equivalent to five per cent. of its outstanding circulating notes?

A. Yes.

(By Mr. BIRNEY:)

Q. It was deposited in pursuance of that statute and the Treasurer held it in pursuance of that statute?

A. Yes.

The plaintiff here rested.

Counsel for the defendant then stated that he had no evidence to offer except the statute.

The evidence here closed, and the above was all the evidence taken on the trial.

Counsel for the defendant then moved the court to instruct the jury to return a verdict for the defendant.

Which motion was granted by the court.

To which ruling of the court the counsel for the plaintiff then and there, and before the jury rendered their verdict, excepted.

Thereupon the jury, under the instruction of the court, returned a verdict for the defendant.

And inasmuch as the said several matters so produced and given in evidence and the several rulings of the court thereon do not appear by the record herein, the counsel for the plaintiff did then and there prepare the foregoing bill of exceptions, which said bill of exceptions contains all the evidence taken at the trial, and did propose the same to the said Andrew C. Bradley, justice of the said court, and the said justice did thereupon sign the same, now for them, this 29th day of June, 1893.

A. C. BRADLEY, *Justice.* [SEAL.]

14 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss*:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing pages, numbered from — to —, inclusive, to be a full, true, and correct transcript of the record of all the proceedings had in said court in cause No. 31013, at law, wherein The Lumberman's National Bank of Williamsport is plaintiff and James N. Huston is defendant, as the same remains upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, this 26th day of August, A. D. 1893.

JOHN R. YOUNG, *Clerk*.

Endorsed on cover: District of Columbia supreme court. No. 251. The Lumberman's National Bank of Williamsport, appellant, *vs.* James N. Huston. Court of Appeals, District of Columbia. Filed Sep. 1, 1893. Robert Willett, clerk.

15 In the Court of Appeals of the District of Columbia.

THURSDAY, *February 15th*, 1894.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT, Appellant, *vs.* JAMES N. HUSTON. } No. 251.

The argument of this case was commenced by Mr. John J. Crawford, for the appellant.

In the Court of Appeals of the District of Columbia.

FRIDAY, *February 16th*, 1894.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT, Appellant, *vs.* JAMES N. HUSTON. } No. 251.

The argument of this case was continued by Mr. John J. Crawford, for the appellant, and Mr. A. A. Birney, for the appellee, and concluded by Mr. John J. Crawford, for the appellant.

16 THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT *vs.* JAMES N. HUSTON. } 251.

This case turns upon the same question decided in No. 250, Twin City National Bank *v.* Nebeker, and was argued and submitted

therewith. In accordance with the opinion therein, the judgment herein appealed from must be affirmed, with costs to the appellee, and it is so ordered.

SETH SHEPARD,
Associate Justice.

(Endorsed:) No. 251. The Lumberman's Nat. Bank of Williamsport, appellant, *v.* James N. Huston, appellee. Opinion. Court of Appeals, District of Columbia. Filed Apr. 16, 1894. Robert Willett, clerk.

17 Court of Appeals of the District of Columbia, April Term, 1894.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT, Appellant, *vs.* JAMES N. HUSTON. } No. 251.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed, with costs.

Per MR. JUSTICE SHEPARD.

April 16, 1894.

18 Court of Appeals of the District of Columbia.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT *against* JAMES N. HUSTON. } No. 251.

And now comes The Lumberman's National Bank of Williamsport, plaintiff herein, and says that on or about the — day of April, 1894, this court entered judgment herein in favor of the defendant and against this plaintiff, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more fully appear from the assignment of errors which is filed with this petition.

Wherefore the plaintiff prays that a writ of error may issue in this behalf to the Court of Appeals of the District of Columbia for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

JOHN J. CRAWFORD,
Attorney for Lumberman's National Bank.

(Endorsed:) 251. Court of Appeals of the District of Columbia. Lumberman's Nat. Bank of Williamsport, pl't'ff in error, against James N. Huston, def't in error. Petition for writ of error. John J. Crawford, attorney for pl't'ff in error. Court of Appeals, District of Columbia. Filed Nov. 1, 1894. Robert Willett, clerk.

19 Court of Appeals of the District of Columbia.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT, Plaintiff in Error, *against* JAMES N. HUSTON, Defendant in Error. } No. 251.

And now comes the said Lumberman's National Bank of Williamsport, by John J. Crawford, its attorney, and says that in the record and proceedings in the above-entitled action there is manifest error in this, to wit:

First. That the court directed a verdict for the defendant in error.

Second. That the court held that there was a statute of the United States which imposed a tax upon the circulating notes of the plaintiff in error.

Third. That the judgment of the supreme court of the District of Columbia in favor of the defendant in error was affirmed.

Fourth. That the said judgment of the supreme court of the District of Columbia was not reversed.

Fifth. That judgment was given for the defendant in error, whereas judgment should have been in favor of the plaintiff in error and against the defendant in error.

Wherefore the plaintiff in error prays that the judgment of the Court of Appeals of the District of Columbia and the judgment of the supreme court of the District of Columbia herein may
20 be reversed, annulled, and altogether held for nothing, and that the plaintiff in error may be restored to all things which it has lost by reason thereof.

JOHN J. CRAWFORD,
Attorney for Plaintiff in Error.

(Endorsed:) 251. Court of Appeals of the District of Columbia. Lumberman's Nat. Bank of Williamsport, pl't'ff in error, against James N. Huston, def't in error. Assignments of error. John J. Crawford, attorney for pl't'ff in error. Court of Appeals, District of Columbia. Filed Nov. 1, 1894. Robert Willett, clerk.

21 In the Court of Appeals of the District of Columbia.

THURSDAY, *November 8th, A. D.* 1894.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT, Appellant, *vs.* JAMES N. HUSTON. } No. 251.

On motion of Mr. Thomas L. Waters, attorney for the appellant in the above-entitled cause, it is ordered by the court that a writ of error to remove said cause to the Supreme Court of the United States be, and the same is hereby, allowed, and the amount of the bond on said appeal is fixed at the sum of five hundred dollars.

22 Know all men by these presents that we, The Lumberman's National Bank of Williamsport, appellant, as principal, and Frederick W. Pratt, of Washington, D. C., as surety, are held and firmly bound unto James N. Huston, appellee, in the full and just sum of five hundred dollars, to be paid to the said James N. Huston, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of November, in the year of our Lord one thousand eight hundred and ninety-four.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between said "The Lumberman's National Bank of Williamsport," appellant, and James N. Huston, appellee, a judgment was rendered against the said "The Lumberman's National Bank of Williamsport," and the said "The Lumberman's National Bank of Williamsport" having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said James N. Huston, appellee, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said "The Lumberman's National Bank of Williamsport" shall prosecute — to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT. [SEAL.]
A. S. PRATT & SONS, *Attorneys.* [SEAL.]
FREDERICK W. PRATT. [SEAL.]

Sealed and delivered in the presence of—
H. W. HODGES.

Approved by—
R. H. ALVEY, *Ch. Justice.*

(Endorsed:) No. 251. Court of Appeals of the District of Columbia. The Lumberman's National Bank of Williamsport, appellant, *vs.* James N. Huston. Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Nov. 19, 1894. Robert Willett, clerk.

23 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between The Lumberman's National Bank of Williamsport, appellant, and James N. Huston, appellee, a manifest error hath happened, to the great damage of the said appellant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of November, in the year of our Lord one thousand eight hundred and ninety-four.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by—
——— ———.

24 UNITED STATES OF AMERICA, *ss:*

To James N. Huston, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein The Lumberman's National Bank of Williamsport is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 19th day of No-

vember, in the year of our Lord one thousand eight hundred and ninety-four.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted this 19th November, 1894.

A. A. BIRNEY,
Att'y for James N. Huston.

[Endorsed:] Court of Appeals, District of Columbia. Filed Nov. 19, 1894. Robert Willett, clerk.

25 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 24, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The Lumberman's National Bank of Williamsport, appellant, *vs.* James N. Huston, No. 251, September term, 1894, as the same remains upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 10th day of December, A. D. 1894.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: Case No. 15,752. District of Columbia Court of Appeals. Term No., 203. The Lumberman's National Bank of Williamsport, plaintiff in error, *vs.* James N. Huston. Filed December 18th, 1894.

167-20

167-203

Supreme Court of the United States.

No. 203.

THE LUMBERMAN'S NATIONAL BANK OF WILLIAMSPORT,
Plaintiff in Error,

against

JAMES N. HUSTON,
Defendant in Error.

Brief for Plaintiff in Error.

JOHN J. CRAWFORD,
Counsel for Plaintiff in Error.

B. H. TYRREL, Printer, 74 Maiden Lane, N. Y.

Supreme Court of the United States.

THE LUMBERMANS' NATIONAL BANK OF WILLIAMSPORT,
Plaintiff in Error,

against

JAMES N. HUSTON,
Defendant in Error,

No. 203.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This is a writ of error to the Court of Appeals of the District of Columbia.

The action is trover to recover the value of one hundred and fifty dollars and fifty cents lawful money of the United States, consisting of gold and silver coins and United States Treasury notes converted by the defendant.

The evidence of the plaintiff showed that the plaintiff, a national banking association, had gone into voluntary liquidation on the 31st of December, 1889, as provided by law; and that prior to January 23d, 1890, the plaintiff had deposited lawful money of the United States to redeem all its outstanding circulating notes. The plaintiff, on the date last mentioned, had on deposit in the Treasury of the United States lawful money of the United States, which had been deposited by it in pursuance of Section 2 of the

Act, June 20, 1874, and which fund was known as plaintiff's "five per cent. fund." The defendant, who was then the Treasurer of the United States, on the date mentioned applied one hundred and fifty dollars and fifty cents of this fund to the payment of a tax claimed by defendant to be due to the United States on plaintiff's circulating notes, and covered the same into the Treasury of the United States. It did not appear that plaintiff ever authorized such use of the money (pp. 12-13).

There was no evidence for the defendant.

At the close of the case the counsel for defendant moved the Court to instruct the jury to return a verdict for the defendant. This motion was granted by the Court, to which ruling counsel for the plaintiff excepted.

The judgment entered upon such verdict, was affirmed by the Court of Appeals of the District of Columbia, to which judgment of affirmance this writ of error was taken.

Assignment of Errors.

The plaintiff in error in this case makes the following assignment of errors:

First.—That the Court directed a verdict for the defendant in error.

Second.—That the Court held that there was a statute of the United States which imposed a tax upon the circulating notes of the plaintiff in error.

Third.—That the judgment of the Supreme Court of the District of Columbia in favor of the defendant in error was affirmed.

Fourth.—That the said judgment of the Supreme Court of the District of Columbia was not reversed.

Fifth.—That judgment was given for the defendant in error, whereas judgment should have been in favor of the plaintiff in error and against the defendant in error.

POINTS.

I.

THE PLAINTIFF WAS THE OWNER AND ENTITLED TO THE IMMEDIATE POSSESSION OF THE MONEY MENTIONED IN THE DECLARATION.

The money claimed by plaintiff to have been converted by defendant had been deposited by plaintiff in pursuance of Section 3 of the Act of June 20, 1874.

Pages 12-13.

By that Section it is provided: "That every association organized, or to be organized, under the provisions of the said Act, and of the several Acts amendatory thereof, shall at all times keep and have on deposit in the Treasury of the United States, in lawful money of the United States, a sum equal to five per centum of its circulation, to be held and used for the redemption of such circulation, which sum shall be counted as a part of its lawful reserve, as provided in Section 2 of this Act; and when the circulating notes of any such associations, assorted or unassorted, shall be presented for redemption in sums of one thousand dollars or any multiple thereof to the Treasurer of the United States, the same shall be redeemed in United States notes. All notes so redeemed shall be charged by the Treasurer of the United States to the respective asso-

ciations issuing the same, and he shall notify them severally on the first day of each month, or oftener, at his discretion, of the amount of such redemptions; and whenever such redemptions for any association shall amount to the sum of five hundred dollars, such associations so notified shall forthwith deposit with the Treasurer of the United States a sum in United States notes equal to the amount of its circulating notes so redeemed."

The money so deposited clearly belonged to the bank. It was to be used for the purpose of redeeming the notes of the plaintiff, and was counted as a part of the plaintiff's reserve fund. It had not been covered into the Treasury; and the legal title thereto had not passed to the United States, but remained in the bank. In short, the deposit was special and not general (see also Act of July 14, 1890, Sec. 6).

Indeed, the whole purpose of the law would be defeated if the title passed to the United States; for then the money could not be used except as Congress should make an appropriation.

Moreover, the testimony shows that the covering of the money into the Treasury was done by defendant on account of the tax claimed to be due, and defendant himself treated the money as belonging to the bank.

The only purpose for which the law authorized it to be used was to pay the notes of the plaintiff; and as the plaintiff had gone into liquidation and had deposited lawful money of the United States to redeem all its notes, the purpose for which the "five per cent. fund" had been deposited had ceased, and the bank then became entitled to receive the same.

Jackson *vs.* United States, 20 Ct. Claims, 306.

II.

THE ACTION OF TROVER IS THE APPROPRIATE REMEDY.

It was held in an early case in England, that trover "lies not for money found, unless it be in a bag or chest." (*Holiday* vs. *Hicks* (Croke's Eliz., 661). But in another case, determined two years afterwards, when the plaintiff obtained a verdict for conversion of part of the contents of a bag of gold, a motion was made in arrest of judgment, on the ground, "that trover and conversion of money out of a bag cannot be good because it cannot be known." The Judges held "that trover and conversion of money only, was good enough, and an action well maintainable for it."

Draycott *vs.* Piot, Croke's Eliz., 818.

All doubts on the question, arising from the legal fiction of loss and finding, in the old action of trover, was set at rest in a subsequent case in the exchequer chamber. The objection was there taken that the action would not lie for money out of a bag, which from the nature of the case could not be identified. "But," says Croke, "all the justices and barons agreed that it well lies; for, although it was alleged that money lost cannot be known—and so, whether it was the plaintiff's money whereof the trover and conversion was—yet the Court said, it being found by a jury that he converted the plaintiff's money, the plaintiff had good cause of action; wherefore the judgment before, being well given, was now affirmed. The justices and barons said that this action lies as well for money out of a bag as of corn which cannot be known.

Hall *vs.* Dean, *Id.*, 841.
Kinaston *vs.* Moor, Cro. Car., 89.

So in *Gordon* vs. *Hostetter* (37 N. Y., 99), it was held

that trover may be maintained for money without proving the specific property converted.

See also Insigi *vs.* Shea, 148 Mass, 538.
Harris *vs.* Lyon, 1 N. Y. City Court, 450.
15 Petersdorf's Abridge., 190. Note.
1 Viner's Abridge., 238.
Talbot *vs.* Spear, Willes, 70, and Note.

Jackson vs. *Anderson* (4 Taunt., 24) was an action of trover for the conversion of 1,969 Spanish dollars. The defendant had received a barrel of dollars containing in all 4,718 dollars, among which were the 1,969 belonging ing to the plaintiffs. The point was made for the defendant that the 1,969 dollars claimed by the plaintiffs had not been so separated from the rest as to enable the plaintiffs to designate them as their own property. Lord Mansfield said: "It appears that no separation was ever made from the whole quantity of 1,969 dollars belonging to the plaintiffs; and an objection has been taken on that ground against the form of the action. But we think there is no difficulty in that point. The defendant has disposed of all the dollars; consequently he has disposed of those which belong to the plaintiffs; *and as all are of the same value, it cannot be a question what particular dollars were his.*"

And it is not essential to the maintenance of an action of trover that the property in respect of which the recovery is sought shall be capable of identification, and distinguished and separated from all other property of like character.

German Nat. Bank *vs.* Meadowcraft, 95 Ill., 124.

Thus it has been held that where grain has been assigned to a public warehouse, and is there stored in bins, mingled with other grain of like character and grade,

belonging to different persons, so that its identity is lost, upon the refusal of the warehouseman to deliver, upon the presentation of the proper warehouse receipts, the quality of grain and of the grade called for by such receipts, the holder of the receipts may maintain trover for the recovery of damages according to the extent of his interest in the property thus converted.

German Nat. Bank *vs.* Meadowcraft, *supra.*
McBee *vs.* Caesar, 15 Oregon, 62.

And it is now held that trover lies for property that exists only in contemplation of law and has no tangible existence, *i. e.*, shares of stock.

Ayres *vs.* French, 41 Conn., 142.
Payne *vs.* Elliott, 54 Cal., 339.
Bank of America *vs.* McNeil, 10 Bush., 54.
Budd *vs.* Multnomah St. R. R. Co., 12 Ogden, 271.
Daggett *vs.* Davis, 53 Mich., 35.
Boylan *vs.* Hugnet, 8 Nev., 345.
Nabring *vs.* Bank of Mobile, 58 Ala., 204, 210.

In Ayres *vs.* French, 41 Conn., 142, 149, the Court of Errors of Connecticut say: "The objection taken to the sufficiency of the first count is founded upon the idea that trover will lie only for property that is tangible and that will admit of being taken into actual possession. This claim is undoubtedly supported by the older authorities. A majority of the Court, however, are of opinion that at the present time, when the action of trover is diverted from its original object of recovering the value of goods lost by the plaintiff and found by the defendant, and all the allegations with respect to such loss and finding are merely formal and unmeaning, there is no good reason for keeping up a distinction that arose wholly from that original

peculiarity of the action, and therefore hold that trover will lie for shares of stock as well as for other kind of personal property."

The declaration describes all kinds of money that were "lawful money of the United States" on the day in question, and the proof showed that the plaintiff had "lawful money" on deposit in the Treasury on that day, and out of this "lawful money" belonging to the plaintiff the defendant applied one hundred and twelve dollars and fifty cents to the payment of the tax alleged to be due. The proof was, therefore, as specific as the law requires; and it was more specific than in some of the cases cited above, for here the allegations and proof were limited to a particular class of money, to wit, legal tender money, while in some of those cases the allegations and proof were of money generally.

The observations of the Court of Appeals of New York are very pertinent. "In the present case the fact was established by the admission of the defendant that the money which he took was the property of the plaintiffs, and, as the amount was conceded, there was no occasion to prove the particulars, in which the coin and bills in question differed from all others of like denomination. The evidence supplied every fact essential to show the conversion and to fix the measure of damages. The money was identified so far as was needful to determine the rights of the parties, and the plaintiffs were bound to go no further."

Gordon *vs.* Hostetter, 37 N. Y., 98, 102.

III.

THE ACT OF THE DEFENDANT AMOUNTED TO A CONVERSION OF THE MONEY.

"It is established as elementary law, by well-settled principles, and a long line of decisions, that any distinct act of dominion wrongfully exerted over property in denial of the owner's right, or inconsistent with it, amounts to a conversion. It is not necessary to a conversion that it be shown that the wrong-doer has applied it to his own use. If he has exercised a dominion over it, in exclusion or in defiance of or inconsistent with the owner's right, that, in law, is a conversion, whether it be for his own or another person's use."

McPheters *vs.* Page, 83 Me., 234, per Foster, J.; s. c. 23 Amer. St. Rep., 772, and note.
Edgerly *vs.* Whalen, 106 Mass., 307.
Loverty *vs.* Snethan, 68 N. Y., 522.
Boyce *vs.* Brockway, 31 N. Y., 490.
Donahue *vs.* Shippee, 15 R. I., 453.
Hollins *vs.* Fowler, L. R., 7 H. L., 757.
Cooley on Torts, 448.

And in a late case in Alabama the rule was thus stated: "It is not essential to a conversion which will support the action of trover that the defendant should have the complete manucaption of the property. An intermeddling with or dominion over the property of another, whether by the defendant alone or in connection with others, which is subversive of the dominion of the true owner is a conversion. Whether the defendant had the possession in himself or not, such intermeddling in defiance of plaintiffs' right, was a conversion."

Bolling *vs.* Kirby, 90 Ala., 215; s. c. 24 Amer. St. Rep., 789, and extended note.

In Hiort *vs.* Bott (L. R., 9 Exch., 86), the defendant was held liable in an action of trover for conversion of a quantity of barley because he, without authority, endorsed a delivery order by means of which the plaintiffs were deprived of their property.

So it has been held that the endorsement and delivery of an elevator receipt may be a conversion of the wheat described in it.

Hamlin *vs.* Carruthers, 19 Mo. App., 567.

And in *Jackson* vs. *Anderson*, (4 Taunt., 24), above referred to on another point, it was held that although the dollars remained in the same unaltered custody, yet the delivery, by the defendant, of the bill of lading, which was the symbol of them, and the receipt of the value, was a conversion.

Here the defendant undertook to exercise dominion and control over the property of the plaintiff, and by his act the plaintiff was deprived of its property. That is all that is necessary to constitute a conversion within all the authorities.

IV.

THE PROVISIONS IMPOSING A TAX ON THE NOTES OF PLAINTIFF ARE INVALID.

This question is fully considered in the brief for plaintiff in error in Twin City National Bank *vs.* Nebeker.

The bill of exceptions in this case does not show that the journals were put in evidence; but it was not necessary to do this, for the question is one of law.

Town of South Ottawa *vs.* Perkins, 94 U. S., 260.

Gardner *vs.* Collector, 6 Wall., 499, 511.

V.

THE JUDGMENT OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, AND THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE REVERSED.

JOHN J. CRAWFORD,
Counsel for Appellant.

167-202

Office Supreme Court, U. S.
FILED
APR 1 1897
JAMES H. McKENNEY,
CLERK

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE LUMBERMAN'S NATIONAL BANK of Williamsport, plaintiff in error, *v.* JAMES N. HUSTON. } No. 203.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1896.

THE LUMBERMAN'S NATIONAL BANK of Williamsport, plaintiff in error, v. JAMES N. HUSTON. } No. 203.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE UNITED STATES.

This case is here on writ of error to the court of appeals of the District of Columbia, presenting for review a judgment rendered April 16, 1894, affirming the judgment of the supreme court of the District of Columbia in an action of trover brought by the Lumberman's National Bank of Williamsport against James N. Huston.

THE CASE.

The declaration (Rec., 5) avers that the plaintiff, a national banking association, "on the 23d day of January, 1890, was lawfully possessed, as of its own property,

of certain money, to wit, gold and silver coins of the United States and United States Treasury notes of great value, to wit, of the value of $112.50, and being so possessed thereof, the plaintiff afterwards, to wit, on the day and year aforesaid, casually lost the said money out of its possession, and the same then came to the possession of the defendant by finding. Yet the defendant, well knowing the said money to be the property of the plaintiff, but contriving and intending to injure the plaintiff in this behalf, hath not as yet delivered the said money, or any part thereof, to the plaintiff, although often requested so to do, and afterwards, to wit, on the day and year aforesaid, converted and disposed of the said money to his, the defendant's, own use, to the plaintiff's damage of $115, for which sum plaintiff claims judgment, besides costs."

It appears from the bill of exceptions (Rec., 11–13) that on December 31, 1889, it was certified to the Comptroller of the Currency that the stockholders of the plaintiff had voted "that the plaintiff go into liquidation and be closed;" that "prior to January 23, 1890, the plaintiff had deposited in the Treasury of the United States lawful money, of the United States to redeem all its outstanding circulating notes. The plaintiff had also on the said date on deposit in the Treasury of the United States lawful money, which had been deposited in pursuance of section 3 of the act of Congress of June 20, 1874, which was known as plaintiff's '5 per cent fund.' Of this '5 per cent fund,' $112.50 was applied in the payment of the semi annual tax. This was done by the defendant, who was then the Treasurer of the United States."

There was produced from the office of the Treasurer of the United States a check which was admitted in evidence, and was as follows:

C. T., No. 32767.] WASHINGTON, D. C.,
January 23rd, 1890.

Treasurer of the United States, Washington, D. C., pay to Lumberman's Nat. Bk., Williamsport, Pa., by deposit in Treasury U. S. in payment of semi-annual duty, one hundred twelve $\frac{50}{100}$ dollars.

$112.50. J. N. HUSTON,
Treasurer U. S., R. A.

It was proven that "the indorsement on the check indicated that the receiving teller of the cashier's office of the Treasury of the United States issued a semiannual duty certificate, and that this was a deposit in favor of the plaintiff for $112.50. It showed that the money was paid into the Treasury of the United States."

It was proved that the 5 per cent fund had been deposited in the Treasury in pursuance of section 3 of the act of 1874; that the Treasurer held it in pursuance of that statute; that it was subject to his check in his official capacity as redemption agent at the time of the liquidation.

All the evidence in the case was produced by the plaintiff. None was offered by the defendant. The jury, under the instruction of the court, returned a verdict for the defendant.

THE ASSIGNMENTS OF ERROR.

First. That the court directed a verdict for the defendant in error.

Second. That the court held that there was a statute of the United States which imposed a tax upon the circulating notes of the plaintiff in error.

Third. That the judgment of the supreme court of the District of Columbia in favor of the defendant in error was affirmed.

Fourth. That the said judgment of the supreme court of the District of Columbia was not reversed.

Fifth. That judgment was given for the defendant in error, whereas judgment should have been for the plaintiff in error, and against the defendant in error.

These assignments failed to point out the error for which the judgment is sought to be reviewed. They have the vagueness, obscurity, and lack of specific point which this court has repeatedly condemned and refused for that reason to notice.

Stevens v. *Gladding* (19 How., 64).
Lucas v. *Brooks* (18 Wall., 436).
Michaels v. *Post* (21 Wall., 398).
Heath v. *Miss. Lev. Commissioners* (109 U. S., 268).

ARGUMENT.

TROVER WILL NOT LIE.

The property alleged to have been lost and then converted is described in the declaration as "certain money, to wit, gold and silver coins of the United States and United States Treasury notes of great value, to wit, of the value of $112.50."

Not any specific coins or specific Treasury notes; not any that were capable of identification by any marks,

badges, or envelope; but simply $112.50 of lawful money, which the bill of exceptions shows was deposited in the United States Treasury as part of a much larger fund, to wit. 5 per cent of the amount of circulating notes of plaintiff, and in nowise distinguishable from the residue of the amount, of which it formed but a small part.

The cases, ancient and modern, agree as to this, that an action of trover will not lie for a money demand, unless the money demanded is susceptible of identification, which means identification either of the notes or coins of which it consists, the package in which it is contained, or the locality where it may be, separate and apart from other money.

In *Holiday* v. *Hicks*, *Croke*, *Eliz.*, *638*, servant sold corn of master and converted the money received. Held by some of the justices that trover would not lie, because the money was never in plaintiff's possession.

Ibid., 661. All the justices and barons resolved, that this action lies not for money found, unless it be in a bag or chest.

Ibid., 746. All the justices and barons held, that when plaintiff lost the possession of the money he lost the property, because it can not be known.

To the same effect, *Orton* v. *Butler*, 5 Barn. & Ald., 652.

Here the defendant never had in his possession *money* at all, any more than a bank officer can be said to have in his possession the money of depositors because balances stand to their credit on the books of the bank.

This is not claimed to have been a *special* deposit; but after it was made it stood like any other deposit made in the United States Treasury—*only a credit on the books of the Treasury.* The plaintiff's remedy, if he had any, was in assumpsit for "money had and received."

THE DEFENDANT NOT LIABLE PERSONALLY.

Although the declaration does not disclose the fact, yet it was proven by the plaintiff in its own behalf that it had deposited in the Treasury of the United States "lawful money which had been deposited in pursuance of section 3 of the act of Congress of June 20, 1874, which was known as plaintiff's '5 per cent fund'"; that "of this '5 per cent fund' $112.50 was applied in the payment of the semiannual tax. *This was done by the defendant, who was then the Treasurer of the United States.*"

That this fund "was deposited in pursuance of that statute and the Treasurer held it in pursuance of that statute." That "it was subject to his check in his official capacity as redemption agent at the time of the liquidation."

So it appears that the defendant had *personally* no custody, control, or power of disposition over this fund. That it stood to the credit of the Treasurer of the United States and was subject to the check of that officer in his official capacity only.

It was never in the possession of this defendant at all.

It is true, to be sure, that the exemption of the United States from judicial process does not protect their officers and agents from being personally liable to an action of

tort by a private person whose rights of property they have wrongfully invaded or injured, even by authority of the United States.

Where an officer of the United States, acting even under the authority of the President or of the head of either of the Executive Departments of the Government, takes possession of, or injures or destroys the property, real or personal, of a private person, he is liable to an action at the suit of such person for the recovery of the possession of the property, or for damages for its loss or injury; and in order to his successful defense, he must show that the right of possession or title to such property was lawfully in the United States. (*Belknap* v. *Schild*, 161 U. S., 17 *et seq.*)

No question is made as to the entire "5 per cent fund" having been deposited in the Treasury of the United States. Nor is it contended that one dollar of that fund has been unlawfully withdrawn from the Treasury of the United States.

The gravamen of this complaint is that the United States Treasurer did, by his check, above given, transfer $112.50 of the "5 per cent fund" deposited by plaintiff from one account to another in the Treasury. The check, it will be seen, was in favor of the plaintiff, not payable to its order, but payable by a deposit in Treasury of the United States in favor of plaintiff for $112.50, in payment of semiannual duty.

So that the defendant personally has at no time had anything whatever to do with the fund. It has never been in his hands, or to his credit, or subject to his order.

Nor has he ever converted it; but it stood to the credit of the Treasurer of the United States, and by his check or order it was placed to an account from which, it may be, the Treasurer by his check can not withdraw it, but an act of Congress may be necessary for the purpose.

Still, this very money here sued for is now just where the plaintiff itself placed it—in the Treasury of the United States; transferred, it may be, to a different account upon the books of the Treasury from that in which it originally stood.

If the Treasurer of the United States, through inadvertence or error of judgment, cause to be "covered into the Treasury" a trust fund held by the Government, or a fund which should properly have been placed on special deposit, he would not thereby subject himself to personal liability as for the conversion of the fund.

The declaration, to be sure, charges that the conversion was made by the defendant, "intending to injure the plaintiff;" but nothing in the record sustains this, and the case stands as a charge of personal liability upon one who, as Treasurer of the United States, transferred from one account to another in the Treasury a small part of an amount which had been deposited in the Treasury, pursuant to the statute (Rec., 13), to the credit of the plaintiff as semiannual dues already accrued. This high officer acted in the exercise of his duty as he construed the law. He has long since ceased to be Treasurer or to have control over the accounts in the Treasury, and this suit should perhaps have abated for that reason. No personal liability, we submit, has at any time attached to him.

THE PAYMENT OF THIS TAX FROM THE FIVE PER CENT FUND WAS ACCORDING TO LAW.

Section 5214, Revised Statutes, provides:

> In lieu of all existing taxes, every association shall pay to the Treasurer of the United States in the months of January and July a duty of one-half of one per centum each half year upon the average amount of its notes in circulation, and a duty of one-quarter of one per centum each half year upon the average amount of its deposits, and a duty of one-quarter of one per centum each half year on the average amount of its capital stock beyond the amount invested in United States bonds.

Section 5215, Revised Statutes, required each association, within ten days from the 1st days of January and July of each year, to make a return under oath to the Treasurer of the United States of the average amount of its notes in circulation, of the average amount of its deposits, and of the average amount of its capital stock beyond the amount invested in United States bonds "*for the six months next preceding the most recent 1st day of January or July,*" and it imposed penalties upon every association failing to make such return of $200, to be collected either out of the interest on the bonds deposited with the Treasurer, or at his option "in the manner in which penalties are to be collected of other corporations under the laws of the United States."

Now, the plaintiff here filed its certificate of liquidation on the 31st day of December, 1889. Why it went into liquidation does not appear. There is nothing in the record to show its insolvency, nothing to show that its assets were not far more than sufficient to pay note

holders, depositors, and stockholders. But when it filed its certificate of liquidation, the tax on circulation, deposits, and stock for the six months preceding January 1, 1890, had already accrued and was due to the United States.

It is not, therefore, like the case of *Jackson, receiver*, v. *The United States* (20 C. Cls. R., 298), which was controlled by the act of March 3, 1879, which prohibited the collection or payment into the Treasury of the United States on account of any bank which had ceased to do business by reason of insolvency or bankruptcy, of any tax which shall diminish the assets thereof necessary for the full payment of all its depositors."

Nor is it like the case of *Johnston* v. *United States* (17 C. Cls. R., 157), where the covering of the amount of the tax into the Treasury had been suspended by the Secretary of the Treasury after the order therefor had been given by him. The bank in that case was insolvent. But the question whether an insolvent national bank was subject to a semiannual tax, or the further question, whether the Treasurer, even if the tax claimed by him was a legal liability of the bank, had a right to charge it against the deposit to the credit of the Comptroller without that officer's consent does not arise and has not been considered in this case.

So far as the record here discloses, nothing had been done by the stockholders of this bank, except to file the certificate of liquidation. No publication thereof had been made and no notice given, as required in section 5221, Revised Statutes, *non constat*, but the stockholders

may have changed their minds before further step was taken.

Certainly the tax had accrued and no reason appears why it should not have been paid.

A fund was in the Treasury of the United States, which, the bank being solvent, belonged to the stockholders. This was the "five per cent fund," deposited in pursuance of section 3 of the act of June 20, 1874, which is as follows:

> That every association organized or to be organized under the provisions of the said act, and of the several acts amendatory thereof, shall at all times keep and have on deposit in the Treasury of the United States, in lawful money of the United States, a sum equal to five per centum of its circulation, to be held and used for the redemption of such circulation; which sum shall be counted as a part of its lawful reserve as provided in section 2 of this act.

By *Act of July 14, 1890* (26 Stat., 289), section 6, provision is made for covering into the Treasury as a miscellaneous receipt the balances standing with the Treasurer of the United States to the respective credits of national banks for deposits made to redeem the circulating notes of such banks; but it is provided that that shall not apply to the deposits received under section 3 of the act of June 20, 1874.

THE PROVISION OF THE ACT IMPOSING A TAX ON CIRCULATING NOTES IS VALID.

While the question is suggested as the fourth point in the brief for plaintiff in error, it is admitted there that

the bill of exceptions in this case does not afford ground sufficient for its support.

In the case of *Town of South Ottawa* v. *Perkins* (94 U. S., 260), cited in support of the view, it appears that in the State of Illinois a statute of that State is not valid unless the legislative journals show that it was passed by a majority of all the members-elect in each house of the general assembly.

In *Spangler* v. *Jacobi* (14 Ill., 297), it was decided that it was "competent to show from the journals of either branch of the legislature that a particular act was not passed in the mode prescribed by the constitution and thus defeat its operation altogether. The constitution requires each house to keep a journal, and declares that certain facts made essential to the passage of a law shall be stated therein. If these facts are not set forth, the conclusion is that they did not transpire."

To be sure, the journals of the legislature may, and indeed must, be consulted if by the Constitution they are made the standard by which the validity of an act of the legislature is to be tested. But this is a Federal statute involved here, and under *Field* v. *Clark* (143 U. S., 649) the Journals of Congress can not be referred to for this purpose. The point will be, however, more thoroughly discussed in the brief in No. 202, *The Twin City National Bank of New Brighton* v. *Nebeker*.

HOLMES CONRAD,
Solicitor-General.